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No.

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Plaintiff-Appellee-Respondent,

vs.

WALE KING,

Defendant,

APPEAL OF SHAMSIDEEN SHOBANDE,

Appellant-Petitioner.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether surety's due process rights were denied when the Seventh Circuit held that even though the surety was denied rights when the bond agreement was altered without notice to him (App. 3-4), and "the sureties' obligation is discharged" (App. 4), the burden of proof was placed on the surety to prove that the change in circumstance "materially altered to the sureties' detriment" (App. 4) actually assisted defendant in his bail jumping?

PARTIES INVOLVED

Shamsideen Shobande, bond surety, appellant-petitioner, signed a bond for criminal defendant (federal court), Wale King.

The United States of America, plaintiff-respondent, was the beneficiary of the bail bond granted to defendant, Wale King.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Shamsideen Shobande, (hereafter, petitioner), prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, affirming the Order of the United States District Court for the Northern District of Illinois, denying petitioner's motion to deny the government's request to enter judgment of forfeiture against surety, Shamsideen Shobande, entered on June 3, 2002.

JUDGMENT AND OPINION BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit is set out as App. A and reported at 349 F.3d 964 (7 Cir. 2003).

JURISDICTIONAL STATEMENT

Jurisdiction in the Court of Appeals was based on 28 U.S.C. § 1291, which provides that appeals from final orders of the District Courts shall be taken to the Court of Appeals.

The case was affirmed on November 17, 2003.

This Petition for Certiorari is timely filed within 90 days thereafter.

Jurisdiction is invoked under 28 U.S.C. § 1254(a) and Rules 10(a), 12 and 13 of this Court.

CONSTITUTIONAL PROVISION

The Fifth Amendment to the U.S. Constitution reads in part:

> "No person shall ... be deprived of life, liberty, or property, without due process of law; ..."

STATEMENT OF THE CASE

On May 22, 1989, a federal grand jury returned a ten-count indictment charging Wale King, among others, with one violation of 18 U.S.C. § 1029(b) and two violations of 18 U.S.C. 1341. On or about August 10, 1990, on the eve of trial, King fled the jurisdiction and a warrant was issued for his arrest.

On May 11, 1990, King was arrested in New York City. He appeared in this jurisdiction approximately one week later, on May 19, 1990, for an arraignment and an initial appearance. He was released that same day on a $50,000 bond, to be secured by $2,500 in cash. King was permitted 14 days in which to have the bond co-signed and to produce the $2,500 in cash to the Clerk's Office. On or about May 28, 1999, appellant, Shamsideen Shobande, as well as Sulley Alawiye, co-signed the $50,000 appearance bond on King's behalf, posting a total of $2,500 in cash.

The release order required King to remain in the Southern and Eastern Districts of New York, where he lived and worked, unless traveling to the Northern District of Illinois for court appearances.

Just prior to the conclusion of the proceedings on May 18, 1999 and after the court had already set the restrictions on King's travel, King indicated that he wanted to travel to Louisiana during the period of May 26 through 30, 1999, for a student government

conference. The government objected to any expansion of the already-set conditions of bond, since King had been a fugitive for nearly nine years. Over the government's objection, the court permitted King to travel to Louisiana for the conference between May 26 and 30, 1999.

On May 28, 1999, sureties, Shamsideen Shobande and Sulley Alawiye, appeared before a deputy clerk in the U.S. District Court for the Southern District of New York and jointly executed a $50,000 appearance bond, securing the bond with $2,500 in cash.

On June 15, 2000, King pled guilty pursuant to a plea agreement. On November 13, 2000, prior to sentencing, King moved on an emergency basis for permission to travel to Nigeria to visit his critically injured 14-year-old daughter. The government objected to the motion because of King's history as a fugitive, the distance to Nigeria and the difficulty of apprehending him in that country should he fail to return. The court granted King's motion over the government's objection. King went to Nigeria and then returned to New York City. King did not appear for his scheduled sentencing on January 4, 2001, and a warrant was subsequently issued for his arrest.

On February 14, 2002, the court granted the government's motion for declaration of bond forfeiture. Surety Shobande moved to deny the government's request for a default judgment, contending that he had

been unaware of the court's decision to allow King to travel to Nigeria and that he never would have consented to such an expansion of bond conditions. On June 11, 2002, the court granted the government's motion for a default judgment against Shobande.

RAISING THE FEDERAL QUESTION BELOW

In the trial court, surety asserted that because the court permitted Wale King to travel to Nigeria contrary to the bond security agreement and this occurred without notice to the surety and without providing surety an opportunity to revoke his position as surety, the agreement was breached, and hence, the court should deny the government's motion for judgment against surety.

The Court of Appeals resolved the matter by unconstitutionally placing the burden of proof on the surety to prove that extending the conditions of defendant's bond caused defendant to flee.

REASON FOR GRANTING CERTIORARI

1.

Surety's due process rights were denied when the Seventh Circuit held that even though the surety was denied rights when the bond agreement was altered without notice to him (App. 3-4), and "the sureties' obligation is discharged" (App. 4), the burden of proof was placed on the surety to prove that the change in circumstance "materially altered to the sureties' detriment" (App. 4) actually assisted defendant in his bond jumping.

The court below held:

> "When a defendant proposes any material change in the conditions of a bond that has been underwritten by sureties, they are entitled to notice and an opportunity to be heard--and to revoke their commitments if the judge alters the terms of release over their opposition. See *Reese v. United States*, 76 U.S. (9 Wall.) 13, 21 (1869), which holds that modifications to a bond made without the consent or knowledge of the surety may render the obligation unenforceable. If the defendant fails to notify the sureties, the prosecutor should do so; and if both sides fail to protect the sureties' entitlement, then the judge should ensure that

notice is given. Cf. Fed. R. Crim. P. 46(f)(3)(C) (district clerk must mail notice to sureties at address of record). Although the surety appoints the clerk as agent for service of process, see Rule 46(f)(3)(B), it remains essential for the clerk (as agent) to send the notice forward; here, however, no one sought to serve the clerk as the sureties' agent. Liability on a bond is a matter of contract, independent of the criminal prosecution--this is why sureties have 60 days to appeal, the same period as in civil litigation to which the United States is a party, see *United States v. Santiago*, 826 F.2d 499, 502-03 (7th Cir. 1987)--and persons potentially liable on a contract are entitled to notice and an opportunity to be heard during judicial proceedings that may affect their interests. Few decisions say this explicitly--maybe the point is viewed as so clear after *Reese* that repetition is unnecessary--but it is at all events a straightforward consequence of suretyship's contractual underpinnings. When they do not get notice and the underlying agreement is materially altered to the sureties' detriment, then the sureties' obligation is discharged." (App. 3-4)

Here, no notice was given to the surety and there was a material change in conditions, the court permitted defendant to travel to Nigeria. (App. 4)

However, the Court of Appeals held to obtain a benefit from the breach of the contract, the surety had the burden of proof to prove that the changed condition had an effect on King's flight after he returned to New York.

The court stated:

> "At oral argument Shobande's counsel suggested that King may have had the passport duplicated by forgers and used the copy to assist his flight. Of that, however, there is no evidence. Indeed, there is essentially no evidence, period. The sureties did not introduce or proffer any, nor did they seek discovery. We do not know whether King surrendered the passport after returning from Nigeria in December 2000. For all we can tell, King is hiding somewhere in New York." (App. 5)

It violates due process to put that burden on the surety. It was the prosecutor's obligation and the clerk's obligation to notify the surety of the request for a bond change. If they had, the surety could have revoked his commitment and there would have been no obligation of the surety.

Because the surety's ability to revoke his commitment was denied because of the court's, i.e., clerk's, and the prosecutor's failure to notify him of the motion to permit defendant to travel, and because of the

government's superior ability to produce evidence on whether King, after he returned from Nigeria, returned his passport and/or did not have a forged passport made, the burden of proof should be on the government.

This Court has stated, as to where the burden of proof lies:

> "There are no hard-and-fast standards governing the allocation of the burden of proof in every situation. The issue, rather, 'is merely a question of policy and fairness based on experience in the different situations.' 9 J. Wigmore, Evidence § 2486, at 275 (3d ed 1940)." Keyes v. School District No. 1, 413 U.S. 189, 37 L.Ed.2d 548, at 563, 93 S. Ct. 2686.

In this case, the government is in a far superior position to know what occurred with King's passport. Do they have information about how and when King fled? Under such circumstances, the burden of proof should be on the government. In Campbell v. United States, 365 U.S. 85, 5 L.Ed.2d 428 (1960), this Court stated:

> "In addition to the consideration that the interest of the United States in a criminal prosecution '... is not that it shall win a case, but that justice shall be done, ...' Berger v. United States, 295 US 78, 88, 79 L ed 1314,

> 1321, 55 S Ct 629, the ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary." 5 L.Ed.2d at 437.

This rule is consistent with prevailing rule of law.

Presumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof. See C. McCormick, Law of Evidence §§ 337, 343 (2d ed 1972).

Here, where the government has a greater ability to obtain and produce evidence as to the effect of enlarging the bond, due process is violated by placing the burden of proof on the surety.

The decision in this case, that failure to give notice to surety of a defendant's desired change of bond conditions, causes the surety's contract to be breached, will raise in the federal courts multiple issues of who has the burden to prove the effect of such breach. This Court should grant certiorari to resolve this issue.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

FREDERICK F. COHN
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Attorneys for Petitioner

APPENDIX

Appendix A

In the
United States Court of Appeals
For the Seventh Circuit

No. 03-1219

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WALE KING,

Defendant.

Appeal of SHAMSIDEEN SHOBANDE

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 89 CR 462—**James B. Zagel**, *Judge.*

ARGUED OCTOBER 31, 2003—DECIDED NOVEMBER 17, 2003

Before POSNER, EASTERBROOK, and EVANS, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* More than 14 years ago a grand jury indicted Wale King on 10 counts of fraud. 18 U.S.C. §§ 1029(b), 1341. Sometime in August 1990, with trial just around the corner, King went underground. A warrant was issued for his arrest, and he was nabbed in May 1999, in New York City. Back in Chicago, King applied for release on bail. Surprisingly, in light of King's

history, Judge Norgle granted this request provided that King could find a surety for a $50,000 bond. The judge released King that very day, without waiting for a surety to underwrite the bond, and also allowed him to leave the jurisdiction. (King told the judge that he wanted to attend a conference in Louisiana.) Ten days later, while King was in Louisiana, two sureties—Shamsideen Shobande and Sulley Alawiye—co-signed King's appearance bond. In June 2000 King pleaded guilty to one count of the indictment, and sentencing was set for November. But he did not appear and is again a fugitive. Between the guilty plea and the date set for sentencing, Judge Zagel granted King's request to have his passport back so that he could visit a daughter in Nigeria. Bank and airline records reflect that King returned to the United States, but he did not return to court. His disappearance led the United States to demand the forfeiture of the bond, and the court entered a judgment against King, Alawiye, and Shobande.

Shobande has appealed; Alawiye and King have not. Shobande contends that, by changing the terms of King's bail without the sureties' consent, the court released any liability on his part. We must assume that the United States has been unable to collect from Alawiye, despite the fact that sureties must not be accepted unless they can assure payment, 18 U.S.C. §3142(c)(1)(B)(xii); Fed. R. Crim. P. 46(e). Otherwise Shobande's appeal is hard to understand. Actually a lot of things about this situation are hard to understand—the grant of bail in 1999 to someone who had been a fugitive for nine years (does the judicial system learn nothing from an accused's conduct?); the return of King's passport after his plea of guilty, at a time when he would have a strong reason to indulge his revealed preference for flight; and the failure of litigants and bench alike to protect the interest of the sureties. When King sought the return of his passport, a step that increased his ability to return to life as a fugitive, he did not

notify the sureties, who would have been entitled to object. Nor did the prosecutor or the judge alert them. So complete has been the disregard of the sureties' interest that notice of the motion to enter judgment against them was sent only to King's lawyer, leading to a default judgment (though this would have been proper in any event under Fed. R. Crim. P. 46(f)(3)(A), which permits judgment against a surety as part of any bail forfeiture). When the sureties found out and complained, seeking either exoneration or a reduction in their exposure, see Rule 46(f)(2)(B), the order denying this motion again went only to King's lawyer. After he learned of the final disposition, Shobande had to seek still further relief from the district court to obtain extra time to file an appeal.

When a defendant proposes any material change in the conditions of a bond that has been underwritten by sureties, they are entitled to notice and an opportunity to be heard—and to revoke their commitments if the judge alters the terms of release over their opposition. See *Reese v. United States*, 76 U.S. (9 Wall.) 13, 21 (1869), which holds that modifications to a bond made without the consent or knowledge of the surety may render the obligation unenforceable. If the defendant fails to notify the sureties, the prosecutor should do so; and if both sides fail to protect the sureties' entitlement, then the judge should ensure that notice is given. Cf. Fed. R. Crim. P. 46(f)(3)(C) (district clerk must mail notice to sureties at address of record). Although the surety appoints the clerk as agent for service of process, see Rule 46(f)(3)(B), it remains essential for the clerk (as agent) to send the notice forward; here, however, no one sought to serve the clerk as the sureties' agent. Liability on a bond is a matter of contract, independent of the criminal prosecution—this is why sureties have 60 days to appeal, the same period as in civil litigation to which the United States is a party, see *United States v. Santiago*, 826 F.2d 499, 502-03 (7th Cir. 1987)—and per-

sons potentially liable on a contract are entitled to notice and an opportunity to be heard during judicial proceedings that may affect their interests. Few decisions say this explicitly—maybe the point is viewed as so clear after *Reese* that repetition is unnecessary—but it is at all events a straightforward consequence of suretyship's contractual underpinnings. When they do not get notice, and the underlying agreement is materially altered to the sureties' detriment, then the sureties' obligation is discharged. See Arthur Adelbert Sterns, *The Law of Suretyship* §6.2 (5th ed. 1972) (James L. Elder, ed.).

It is too late to give the sureties notice and an opportunity to object, so they invoke the principle that a material change in the terms of release—which is to say a change that significantly augments the risk that the defendant will not appear when required—relieves them of their obligations. See *United States v. Gambino*, 17 F.3d 572 (2d Cir. 1994). That a material change in risk can discharge the surety's obligation is a staple of suretyship law; the principle is not limited to criminal cases. See *Restatement (Third) of Suretyship & Guaranty* §§ 37, 41(b)(i) (1996); *Law of Suretyship*, *supra*. Nor can it be limited to changes over the prosecutor's objection. The prosecutor contends that, because the United States opposed the return of King's passport, while the prosecutor in *Gambino* agreed to the change in conditions of release, the sureties must continue to stand behind King's appearance. We do not think that it can matter who favored the change; sureties' obligation rests on contract, so the right question to ask is what risk they agreed to accept. Having failed to notify the sureties of judicial proceedings that potentially affected their interests, the United States is not well situated to contend that judicial errors in changing the terms of King's release come at the expense of the sureties rather than the Treasury, or that the sureties would have approved had they been told what was afoot. (Shobande denies that he

would have agreed. The lack of timely notice forces us to take Shobande at his word.)

Still, to say that a material increase in risk can exonerate the surety is not to say that it always does so. It is necessary to ask whether the incremental risk came to pass. Suppose that the district court had released King on condition that he remain at home, with electronic monitoring of his movements. See 18 U.S.C. §3142(c)(1)(B)(iv). If the judge later permitted King to travel to New Orleans for a conference, that would have increased the sureties' risk; and if he had failed to return to Illinois, the realization of that risk would have made it inappropriate to collect from the sureties. Now suppose, however, that King *did* return and was again required to remain home with electronic monitoring. If he sawed off the ankle bracelet and bolted for parts unknown, the sureties would remain liable—for *that* form of flight would have been exactly the risk they took. The authorized trip would not have played a role. One can say much the same about the actual events. The judge authorized King to travel to Nigeria, and had he stayed there the sureties would have had a good defense to payment. He did not remain abroad, however; King returned to New York (where the original bond allowed him to reside) and only *then* vanished. The risk of that disappearance is exactly the one these sureties voluntarily took.

At oral argument Shobande's counsel suggested that King may have had the passport duplicated by forgers and used the copy to assist his flight. Of that, however, there is no evidence. Indeed, there is essentially no evidence, period. The sureties did not introduce or proffer any, nor did they seek discovery. We do not know whether King surrendered the passport after returning from Nigeria in December 2000. For all we can tell, King is hiding somewhere in New York. When conditions of bond are violated, forfeiture is presumed. See Fed. R. Crim. P. 46(f)(1).

Sureties must shoulder the burden of demonstrating entitlement to exoneration or reduction. Fed. R. Crim. P. 46(f)(2)(B), (g). The paucity of evidence therefore redounds to the sureties' detriment. Shobande has not demonstrated that King's disappearance may be attributed to the incremental risk associated with the change in conditions, as opposed to the original risk associated with posting bond for a defendant with an established propensity for flight.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit